No. 13,300

IN THE

United States Court of Appeals

For the Ninth Circuit

VELMA L. SHELLEY,
Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation, and ALASKA SALES & SERVICE, INC., a corporation,
Appellees.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLEES.

DAVIS & RENFREW,
Box 477, Anchorage, Alaska,
Attorneys for Appellees.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

No. 13,300

IN THE

United States Court of Appeals

For the Ninth Circuit

VELMA L. SHELLEY,
Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation, and ALASKA SALES & SERVICE, INC., a corporation,
Appellees.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLEES.

I.

STATEMENT RELATING TO PLEADINGS AND JURISDICTION.

This is an appeal taken by appellant (plaintiff in the lower Court) from a final judgment rendered on the 27th day of November, 1951, by the District Court for the Territory of Alaska, Third Division, in favor of the appellees (defendants in the lower Court) and against the appellant. Appellant, in her brief (page 1) inadvertently has stated that this is an appeal from

the District Court for the Territory of Alaska, *Fourth* Division.

The District Court for the Territory of Alaska is a Court of general jurisdiction consisting of four divisions, of which the Third Division is one. Jurisdiction of the District Court is conferred by Title 48 U. S. Code, Section 101. See also Alaska Compiled Laws Annotated, 1949, 53-1-1. Practice or procedure in the District Court, since July 18, 1949, has been controlled by the Federal Rules of Civil Procedure which were extended to the Courts of the Territory of Alaska on that date. 63 Stat. 445, 48 U.S.C. 103A.

Jurisdiction of this Court to review the judgment of the District Court is conferred by new Title 28, U.S.C., Sections 1291 and 1294, and is governed by the Federal Rules of Civil Procedure.

Appellees accepted the statement of appellant in her brief as to the pleadings in the case. Contributory negligence of the plaintiff was not affirmatively pleaded in the answers of either defendant. The original pleadings are before this Court for its use.

This matter was tried by the District Court, with a jury, between the 20th day of September, 1951, and the 28th day of September, 1951. On the latter date the jury returned a verdict in favor of both defendants and against the plaintiff. (Transcript 465.)

During the course of the trial certain evidence was admitted from which the jury might properly have inferred that plaintiff's fall and any resulting injuries to the plaintiff were the direct and proximate

result of her own negligence, or that such fall and any resulting injuries were the result of contributory negligence or concurring negligence of the plaintiff. This evidence was given by witnesses called by the plaintiff as will be shown in the following argument. No evidence bearing on contributory negligence was offered by either defendant. No protest or objection was made by the plaintiff or on her behalf concerning the evidence received from which contributory negligence might appear. At the close of the trial the Court instructed the jury on the law of the case including various instructions upon issues as to the question of plaintiff's negligence or contributory negligence, which as above mentioned had arisen by reason of evidence adduced from plaintiff's witnesses and issues which appellees claim were before the Court by common consent of all the parties.

During the course of the trial plaintiff presented to the Court her offered instructions, including offered instruction number one having to do with the question of negligence of the plaintiff. Plaintiff's offered instruction numbered one reads as follows:

> "Plaintiff's offered Instruction No. 1.
>
> You are instructed that the allegations of the defendants to the effect that plaintiff was negligent and that her negligence caused the injuries, must be proved by the defendant or defendants alleging the same, and that these are affirmative defenses, and that the same degree of burden of proof is upon the defendant to prove the plaintiff's negligence to be the cause of the accident,

> as there is upon the plaintiff to prove the negligence of the defendant; therefore, if you find the weight of the evidence is equally balanced or preponderate in favor of the plaintiff, then the defendants have not proved their allegations and your findings should be against such allegations."

Plaintiff excepted to the failure of the Court to give her offered instructions, including number one above quoted, on the specific ground that the offered instructions *"clearly state the law in the case"*. (Transcript 459.) (Emphasis supplied.)

Plaintiff through her attorney excepted to the giving of instruction numbered six as given by the Court and having to do with contributory negligence. This instruction is set out in full in appellant's brief (page 3) as well as in the copy of the Court's instructions which is before the Court. The plaintiff's exception to such instruction was taken on the specific ground that contributory negligence had not been pleaded. (Transcript 459.) No objection was made or exception taken on behalf of the plaintiff as to any other instruction or part or portion of instruction as given by the Court and no objection was made or exception taken to the content of instruction number six, as given by the Court, or of any claimed error in law in the instruction as given except the claim that the instruction was not within the scope of the pleadings. (Transcript 459 and 463.)

On October 2, 1951, plaintiff filed her motion for a new trial. Such motion in paragraph III thereof

claimed that the trial Court had erred in giving instruction numbered six "for the reason that there was no adequate plea of contributory negligence". Paragraph IV of the motion for new trial claimed that "the Court erred in giving instruction on independent contractor as there was *no* a sufficient allegation in the answer to justify such instruction". The latter proposition had not been previously raised either by objection or exception, or otherwise.

None of the pleadings were taken by the jury to the jury room. (Transcript 437-438.)

Defendants on October 24, 1951, moved to be allowed to amend their answers to specifically allege contributory negligence of the plaintiff in order to conform to the proof and on the ground that such issue had been raised by evidence presented by the plaintiff without objection of the defendants, and that such issue had been tried by common consent of all the parties during the course of the trial in the District Court. Copies of proposed amended answers were filed by each of the defendants and served with the motions. The motions and the amended answers are before this Court.

Argument was had to the Court on plaintiff's motion for new trial and on defendants' motions to amend their answers, as above set forth, and upon plaintiff's objections to such motions. The trial Court, on November 23, 1951, overruled the motion for new trial and granted the separate motions of the defendants to be allowed to amend their answers.

Judgment was thereupon entered in favor of the defendants and against the plaintiff in accordance with the jury verdict. This appeal followed.

II.

SUMMARY OF ARGUMENT.

Appellant has claimed that the District Court erred in instructing the jury upon contributory negligence when contributory negligence was not affirmatively pleaded in the answers. Appellant also claimed that the trial Court erred in denying plaintiff's motion for a new trial and allowing defendants to file amended answers to plead contributory negligence after the verdict. In her brief appellant also claims that the Court erred in giving certain other instructions.

Appellees believe that the only questions for consideration by the Court are as to the propriety of the trial Court giving an instruction on contributory negligence and as to whether appellant has shown any prejudice by reason of the rulings of the trial Court.

Appellees believe that on the face of the record that defendants' separate motions for dismissal of the action and for judgment for the defendants as made at the close of the plaintiff's case and as renewed at the end of the trial, should have been granted and for that reason appellant could not have been prejudiced in any manner by the giving of the instruction to which she excepted.

It affirmatively appears in this action that evidence was produced by the plaintiff herself from which the jury might properly have inferred that the plaintiff's own negligence was the direct and proximate cause of her fall and of her resulting injuries. Accordingly the issue of contributory negligence was properly before the Court without any affirmative plea of contributory negligence in the answers. For that reason the Court properly instructed on the issue of contributory negligence and the giving of an instruction on that theory was not error and the plaintiff was not prejudiced thereby.

Rule 15(b) of the Federal Rules of Civil Procedure provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleadings. Such rule further provides that such amendment to the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend will not affect the result of the trial of these issues. In this case the issue of contributory negligence was not raised by the pleadings but was tried by implied consent of all the parties on evidence introduced by appellant herself and the Court properly treated such issue as being before the Court as if it had been raised by the pleadings. This Court and other Courts of Appeal and the Federal District Courts in interpreting Rule 15(b) have held that issues not raised by the plead-

ings but tried by express or implied consent of the parties are to be considered as a part of the case even though not pleaded.

Under the provisions of Rule 15(b) an amendment of the answers was not required but likewise under such rule the Court had full power to allow amendment of the pleadings after verdict as was done in this case. The Court did not abuse its discretion in allowing such amendment and the plaintiff was not prejudiced by such ruling.

By the terms of Rule 61 of the Federal Rules of Civil Procedure no error or defect in any ruling or order, or in anything done or omitted by the Court or by any of the parties is ground for granting a new trial or for setting aside a verdict, or for vacating, modifying or otherwise disturbing the judgment or order unless refusal to take such action appears to the Court inconsistent with substantial justice. By the same rule the Court at every stage of the proceedings must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties. Appellant here has not shown that she was prejudiced in any way by failure of defendants to plead contributory negligence. She was not surprised. She introduced the evidence in question. She herself requested an instruction on contributory negligence and excepted to the failure of the Court to give the requested instruction. The error, if error it was, in the failure of defendants to affirmatively plead the issue of contributory negligence was

merely technical. It did not affect the substantial rights of any of the parties and it did not prejudice the plaintiff. The Court properly disregarded such error or defect in the proceedings. The action taken by the District Court is not in any way inconsistent with substantial justice and the appellant has shown no reason why the judgment of the District Court should be reversed.

III.

ARGUMENT.

Appellees believe that appellant's "statement of points" raise three questions of law as follows:

(1) Points numbered one and five claim that the trial Court erred in giving instruction numbered six having to do with contributory negligence. Point number one is limited to a claim that the instruction was given in error solely on the ground that contributory negligence was not pleaded in the answers. Point number five claims that the Court erred in giving instruction number six because contributory negligence was not pleaded in the answers and in addition claims that the instruction as given was defective for various other reasons.

(2) Points numbered three and four claim that the Court erred in permitting defendants to file amended answers after the verdict of the jury.

(3) Point numbered two claims that the Court erred in giving an instruction on "independent con-

tractor", on the ground that "there was no sufficient allegation in the answer and no evidence admitted except over objections of plaintiff to justify an instruction thereon".

In her opening brief appellant, by inference at least, objects to portions of instruction numbered five, seven and eight, in addition to the objection previously made to instruction numbered six, under a claim that, in the words of appellant's brief (page 8) that "the Court by said instructions over emphasized this affirmative defense of contributory negligence even though it was never pleaded nor proved".

Since no timely objection was made or exception taken in the trial Court to any instruction or portion of instruction given by the trial Court except as to instruction numbered six, and since the only objection to instruction numbered six made in the trial Court was that such instruction was "not within the pleadings, because there is no plea of contributory negligence in the answer" (Transcript page 459), appellees believe that the important question before this Court is as to whether failure of the defendants to plead contributory negligence in their respective answers precluded the Court from instructing on contributory negligence.

A corollary question is as to whether plaintiff was prejudiced in any manner by the fact that defendants' respective answers did not affirmatively plead the defense of contributory negligence of the plaintiff. If either of those questions is resolved against

the appellant then it would appear that defendants' respective motions to file amended answers and the action of the Court in granting such motions need not be considered by this Court.

Since appellant at the trial did not raise any objection or take any exception to the instruction as given by the trial Court concerning the doctrine of independent contractor or to the contents of or the correctness of the law stated in instruction numbered six as given by the Court and since no citations to either case or statute law were made or any argument had concerning such propositions in appellant's opening brief, appellees will treat such points as not being properly before this Court or as having been abandoned by appellant. Appellees will confine their argument to the propriety of the District Court instructing concerning contributory negligence when that defense had not been affirmatively pleaded by defendants and to the question as to whether or not the plaintiff has shown that she was prejudiced in any manner by the giving of the instruction in question when contributory negligence had not been pleaded.

Appellees will likewise discuss the action taken by the trial Court in granting the motions of the respective defendants to amend their answers after verdict.

At the outset appellees wish to point out that at the close of plaintiff's case each of the defendants moved for dismissal of the action and for judgment in favor of the respective defendants on the ground that the plaintiff had failed to prove her case as against either of the defendants. (Transcript 351-

352.) These motions were denied by the trial Court at that time. Each of such motions were renewed by both defendants at the close of all of the evidence and the motions were again denied by the trial Court. (Transcript 452.)

Appellees respectfully wish to call the attention of this Court to the fact that the record does not disclose a shred of evidence before the Court at the close of plaintiff's case from which the jury could properly deduce that either of the defendants had been guilty of any negligence. Appellees further respectfully suggest to this Court that at the close of plaintiff's case there was no substantial evidence at all before the Court from which the jury might properly have inferred that plaintiff's fall and her resulting damages were the proximate result of any negligence or carelessness of the defendants, or of either of them. The record in this case is unique in that there is no direct evidence in the record to the time when plaintiff closed her case to the effect that either of the defendants delivered any oil to the premises in question on the day in question, or that any oil was spilled by either of the defendants, or that if any oil was spilled that such spilling involved any negligence on the part of either defendant. Likewise there was no evidence at all before the Court at the close of plaintiff's case to indicate that the defendants had not cleaned up any oil which may have been spilled or which may have "blown back" without fault of the defendants, or of either of them.

The only evidence concerning delivery of oil on the day in question was by the witness Rodin who testified that the oil had been delivered by Union Oil Company. On cross-examination he admitted that he had not seen any oil delivered and knew nothing about it, and that he was merely speculating that it must have been delivered by the Union Oil Company. In that connection see transcript beginning at page six on direct examination of Mr. Rodin where the following questions and answers are recorded:

> "Q. And on that particular morning did you see a delivery or know of a delivery of oil having been made there at the premises?
>
> A. Well, not at that time I didn't, but I noticed when I come out that there was oil spilled all over the back steps there so that the oil company had been there filling up the oil tanks.
>
> Q. Now, do you know what company made the deliveries there regularly?
>
> A. The Union Oil Company * * *
>
> Q. Where were you that morning, Mr. Rodin?
>
> A. I was in my sleeping quarters just right behind there just two or three feet from the downstairs steps."

See also transcript beginning at page 8 where the following questions and answers are recorded:

> "Q. Now after you dressed and you came out what did you see?
>
> A. There was oil all over the platform and the steps up there so I asked when I got into the kitchen what happened, well the Union Oil Company was there delivering some oil and they spilled oil all over the steps there, so I went in

and I called up the company to come out and clean it up."

See also transcript page 11:

"Q. I see. Well, were they or were they not employees of the Union Oil Company? Or the persons who deliver Union Oil?

A. One of them was the one that delivered the oil, I think he was the one that spilled the oil there on the steps if I am not mistook."

See also transcript, page 13, where the following questions and answers are recorded:

"Q. Would you tell the jury whether or not the truck that delivered oil there had any inscription on the side of it? Any name on it?

Mr. Davis: Your Honor, I think he testified that he didn't see the truck.

A. I didn't see that. I didn't see any on it.

The Court. The objection is sustained."

See also cross-examination of this witness beginning on page 22 of the Transcript where the following questions and answers are recorded:

"Q. You don't know, do you whether the man worked for the Union Oil Company or not, do you?

A. Well, I think he was the one that spilt the oil there on the steps. I don't know, but that is what I understood there.

Q. How did you understand it? Did somebody say so?

A. Somebody was talking there.

Q. Do you know who that somebody was?

A. I don't know who it was.

Q. As a matter of fact, Mr. Rodin, you don't know anything at all about who it was that delivered that oil, do you?

A. No, I wasn't up.

Q. And you actually don't know of your own knowledge who cleaned it up?

A. I know the man that come from the Union and cleaned up after I called up. That is all I know about it.

Q. What you mean, Mr. Rodin, is that you called the Union Oil and then somebody came and cleaned it up. Is that it?

A. Yes.

Q. Alright. Had you done anything at all to try to clean it up in the meantime?

A. No, I didn't. It is not my business to do anything about it."

It would seem from the testimony of all of plaintiff's witnesses that there was considerable oil on the back landing on the morning in question. Some of the witnesses claimed there was also oil on the steps and some that there was oil in the sump at the bottom of the steps. One witness even claimed that the oil was "a good quarter of an inch covered on the platform, cement slab, at that time it was a cement slab outside the door. I think it was about 5 by 8, or something like that. That was covered with it and then the same amount had run down the steps and I could say it was a good quarter of an inch of oil out there". (Testimony of Sigrid Rodin, transcript page 38.) However there is no testimony at all as to how the oil got there, or as to whether one of the tanks had blown

back after the oil truck driver had left or as to whether some third party had put oil there, or how it got there at all. The claim that the oil was spilled or left by either of the defendants was pure speculation, not supported by any evidence whatsoever.

This case is also unique in that there is no direct evidence whatsoever as to the cause of plaintiff's fall. Various witnesses testified as to the fact that plaintiff fell and some of them testified that there was oil on her uniform and on her arm, but appellees feel that it is singular that the plaintiff herself gave no testimony whatsoever as to the cause of her fall. In fact she did not testify that she fell at all. If there was oil on the back of the platform and the steps as testified by plaintiff's witnesses, plaintiff could not have avoided being smeared with oil when she fell, no matter what may have caused her fall and once again it is left purely to conjecture as to whether her fall was caused by her crepe soled shoes or by the unevenness of the steps, or by a mixture of water and salt and an accumulation of grease or by the oil, or by any combination of such factors. One could speculate as to what caused the fall but there is no evidence at all in the record to suggest that the oil caused the fall, or that it was any more likely to have caused the fall than any one of the several other possibilities.

Accordingly, appellees argued to the trial Court, and maintain here, that at the close of plaintiff's case the motions made by the respective defendants should have been granted. If on the entire record it appears, as maintained by appellees, that there was no

substantial evidence to justify a verdict in favor of plaintiff and against defendants, or either of them, at the close of plaintiff's case, then instructions to the jury were not necessary. The case should not have been sent to the jury at all and the question of the propriety of an instruction on contributory negligence is immaterial. If our position is correct, appellant would not be in a position to claim that she was prejudiced by the giving of any of the Court's instructions.

The trial Court, however, did allow the case to go to the jury and did instruct the jury, and if appellees are wrong in their contention that plaintiff failed to prove her case, appellees believe that under the evidence introduced in this case, the question of plaintiff's contributory negligence was properly before the Court, and the Court was justified in giving an instruction on contributory negligence. In fact appellees maintain that the trial Court would have been in error had it refused to instruct the jury on the question of contributory negligence on the state of the record which was before that Court and which is before this Court on this appeal.

According to the testimony of plaintiff's witnesses, there was considerable oil on the landing and possibly on the steps and on the lower landing at the time that plaintiff fell and for some time prior thereto. We call the Court's attention to certain excerpts from the testimony. These excerpts are not meant to be exclusive or to cover the entire testimony, but are

samples of the rather voluminous testimony on that point.

The testimony of Mr. Rodin called as a witness for the plaintiff on his direct examination found on page six of the transcript is as follows:

> "Well, not at that time, I didn't, but I noticed when I come out that there was oil spilled all over the back steps there * * *"

Again on page nine of the transcript, the same witness testified:

> "There was oil all over the platform and the steps up there * * *"

The witness Sigrid Rodin called on behalf of the plaintiff on direct examination testified as found on page 38 of the transcript as follows:

> "Q. Did you then look at the steps?
>
> A. Not then, but I had looked at them previously.
>
> Q. And did you see oil on them?
>
> A. There was oil spilled all over the platform outside the door and down the steps.
>
> Q. Could you give the jury some idea approximately how many gallons of oil appeared to have been spilled there?
>
> A. I couldn't say as far as gallons are concerned, but I think there was a good quarter of an inch covered on the platform, the cement slab, at that time it was a cement slab outside the door. I think it was about five by eight or something like that. That was covered with it and then the same amount had run down the steps, and I could

say it was a good quarter of an inch of oil out there.

Q. And did you notice whether or not this oil had accumulated at the base of the steps?

A. No, I couldn't say that."

The same witness on cross-examination testified as follows, commencing at the bottom of page forty of the transcript:

"Q. You said you had seen the oil previously. How long prior to her fall had you seen the oil on the stairway?

A. It couldn't have been more than fifteen, ten or fifteen minutes or so.

Q. I beg your pardon.

A. It couldn't have been very much more than ten or fifteen minutes, because I came in shortly before that.

Q. You saw the oil as you went from your quarters——

A. Yes.

Q. ——to the kitchen?

A. Yes.

Q. About ten or fifteen minutes before, you surmise?

A. Something like that.

Q. Did you walk through the oil?

A. Yes, I did.

Q. When Mrs. Shelley stated she was going to run downstairs did you tell her to be careful of oil on the landing or stairway?

A. I forget whether I did or not. I know I fussed about the oil being out there. It was awful dirty and tracked in.

Q. That was before she——

A. Before she went down there.

Q. You had fussed about the oil being there?

A. Of course, as I say, I didn't think about the stairway particularly. I was more concerned about the platform because it was tracking into the restaurant.

Q. But you had mentioned the fact or raised a fuss about that oil being there in the kitchen?

A. Yes.

Q. Do you remember if you directed that statement to everyone there or——

A. Oh, not particularly just generally.

Q. Just talking to the other people there?

A. Yes.

Q. Now was the oil there standing there a quarter of an inch thick or was it flowing?

A. It seems to me that it must have been a quarter of an inch because it was very gooey."

The witness Adelle Osborn called on behalf of the plaintiff testified on cross-examination as follows, commencing on page 51 of the transcript:

"Q. You saw a lot of oil out on that cement landing, did you?

A. Oh, yes, yes there was a lot of oil out there.

Q. Very obvious (bovious) it was oil? You could see it was oil?

A. Oh, yes.

Q. You could see that it wasn't water, couldn't you?

A. Oh, yes. You could see it was oil.

Q. Now, did you look down the steps at all?

A. Did I look down the steps?

Q. Yes.

A. No, I didn't have time to look down the steps. I just looked out of the door.

Q. So what you are talking about here is the landing outside the back door?

A. That's right.

Q. And that obviously was covered with a lot of oil?

A. That's right."

The witness Grace Williams called on behalf of the plaintiff on direct examination testified as follows commencing on page 118 of the transcript:

"Q. Did you go to the back door of that kitchen that day and examine to see where she had fallen?

A. Yes, as soon as she said she fell down the steps, because I go out and go down the steps too to the store room——

Q. Yes.

A. ——and it was, as I say, just before the luncheon hour and we were very busy and I dashed out to see what I could see.

Q. What did you see, Miss Williams, when you went out there?

A. Well, I could see it was all covered with oil down on the steps, all the way down there."

The witness Gaylon D. Michael called on behalf of the plaintiff testified on direct examination as follows, commencing on page 127 of the transcript:

"Q. Just in your own words tell the jury about what condition those steps were in.

A. Well, there was oil all over the steps. There was oil down in the bottom. I would say there was at least a half inch or more oil lying in the bottom, which could have consisted of water in the bottom too, but there was oil all over the steps. There was oil all over the front of the steps and the cement block approaching the steps there was oil all over that."

The witness Perry S. McLain called on behalf of the plaintiff on direct examination testified as appears on page 141 of the transcript as follows:

"Q. What did you see there?

A. Considerable oil, especially in that pit at the bottom of the stairs, there was considerable oil in that pit. The bottom landing was offset lower than the floor into the basement of the Legion Building, and there was considerable oil in there and all the way up the stairs there was considerable oil."

From the foregoing testimony, as well as from the other testimony to the same effect, it appears that at the time of plaintiff's fall and for at least fifteen minutes prior thereto and for some time thereafter there was considerable oil on the landing and possibly on the steps and the lower landing as well and that such oil was plainly visible and apparent to anyone who looked in that direction and it appears that there is at least a very strong probability that the plaintiff was warned by Mrs. Rodin or had heard Mrs. Rodin fussing about the oil on the landing, and the mess it caused in the kitchen, prior to the time that

plaintiff started for the basement. It appears clear to appellees that there was a great deal of evidence before the jury from which the jury might properly have inferred that plaintiff saw or, by the reasonable use of her faculties, should have seen the oil before she stepped out onto the landing. It appears that on the evidence introduced by the plaintiff the jury were entitled to consider the question of plaintiff's negligence in stepping into the oil prior to her fall.

On the evidence as presented to the Court it appears to appellees that the Court would have committed prejudicial error had it refused to instruct the jury concerning the issue of plaintiff's own negligence or contributory negligence.

Appellant in her brief has cited numerous cases for the proposition that an instruction on contributory negligence is not justified where that defense is not affirmatively pleaded.

Many jurisdictions consider that the issue of contributory negligence may be raised by a general denial and need not be specifically pleaded.

Assuming, for the purpose of argument, that under the laws of the Territory of Alaska and the practice under the Federal Rules of Civil Procedure contributory negligence must be affirmatively pleaded by the defendant in order for the defendant to introduce evidence in support of that proposition, it doesn't follow that defendant is precluded from taking advantage of evidence introduced by the plaintiff from which contributory negligence might be found by a

jury. Neither does it preclude the Court from instructing the jury concerning contributory negligence or preclude the jury from considering contributory negligence where that issue has been injected into a case by the plaintiff's testimony.

A reading of the cases cited by appellant in her brief will disclose that nearly all of such cases had to do with situations where contributory negligence was not pleaded and no evidence was introduced which raised a question as to contributory negligence or involve situations in which the defendant was precluded from introducing evidence in support of a theory of contributory negligence where that issue had not been raised by the defendant.

At common law and under procedural statutes in "code" states even where the Courts require a defendant to raise the issue of contributory negligence by affirmative pleading the Courts have held that the issue of contributory negligence is properly before the Court where evidence to support that theory was admitted either by the plaintiff's evidence or by the defendant without objection from the plaintiff. As samples of cases supporting such proposition, appellees call the attention of the Court to the following cases:

> *Bogdon v. Los Angeles & Salt Lake Railroad Co.,* 205 Pac. 571, decided by the Supreme Court of Utah in the year 1922.

In that case the plaintiff by his guardian ad litem sued the defendant railroad for personal injuries re-

ceived by the plaintiff when certain blasting powder exploded while he was trying blow up a tin can. Plaintiff claimed that the defendant was negligent in leaving blasting powder in railroad cars.

The answer did not contain a plea of contributory negligence of plaintiff. At the close of plaintiff's case, defendant moved for nonsuit on the ground that plaintiff had not proved any negligence. That motion was denied. The motion for directed verdict was renewed at the close of all the evidence on the ground that there was not sufficient evidence of negligence. That motion was denied. Judgment for the plaintiff was granted. On appeal the Supreme Court reversed the judgment for the plaintiff and held that the lower Court should have given a requested instruction on contributory negligence using the following language:

> "It was, however, only necessary to plead that defense if defendant desired to present affirmative evidence upon that question. It could, however, *without an affirmative plea,* take advantage of evidence produced by the plaintiff, if from a consideration of that evidence it was made to appear that the plaintiff was guilty of contributory negligence which was the proximate couse of the injury."

Later in the opinion the Court uses the following language:

> "That defendant may rely upon plaintiff's evidence in that regard and may move for a nonsuit for a directed verdict upon plaintiff's own evi-

> dence showing contributory negligence, and that he may request the Court to charge upon that question upon such evidence, is fully considered and determined in favor of the proposition by this Court."

and again,

> "The District Court should have given defendant's request, or if it preferred to charge the jury in its own language, it should have done so. Where therefore, there is evidence of contributory negligence, the trial court should not ignore that question merely because there is no affirmative plea of contributory negligence."

The case of *Chicago, Burlington and Quincy Railroad Company v. Cook,* 102 Pac. 657, decided by the Supreme Court of Wyoming in 1909 involved a suit to recover for the loss of certain buggies belonging to the plaintiff and which were burned in a fire near the railroad track. The plaintiff claimed that the fire was set by defendant's locomotive. The evidence introduced on behalf of plaintiff showed that the right-of-way was filled with trash and paper, part of which had been left by the plaintiff in unpacking the buggies. Defendant in its answer did not plead contributory negligence as an affirmative defense. Judgment was given for the plaintiff by the trial Court and was reversed by the Supreme Court which used the following language:

> "The established rule in such cases is that, when a defendant relies on contributory negligence as the defense, he is barred from introducing evidence of such negligence unless he has pleaded it

as a defense. Such plea constitutes an affirmative defense, and the issue must be tendered by him in order to entitle him to introduce evidence in support of such defense. This rule, however, does not bar the defendant from taking advantage of anything in plaintiff's evidence which defeats his right of recovery. In other words the plaintiff must make out a case by the evidence, and, if upon all the evidence, he is not entitled in law to recover the fact may be taken advantage of by the defendant. Although contributory negligence was not pleaded as a defense, yet the undisputed evidence shows plaintiff to have been guilty of contributory negligence which resulted in the loss of her property * * * it was developed by her evidence in making out her case that defeated her right to recovery. Upon the record the Court erred in not granting the motion for directed verdict * * * The Court although requested to do so, refused to instruct the jury upon the question of contributory negligence. Had there been a conflict in the evidence as to whether her acts were excusable or justifiable, it would have been proper to have instructed the jury on that phase of the case."

The case of *J. Maury Dove Co. v. Cook,* 32 Fed. (2d) 957 was decided by the Court of Appeals for the District of Columbia in the year 1929, prior to the adoption of the Rules of Civil Procedure. In that case, the plaintiff walked into the street for the purpose of boarding a street car. Plaintiff admittedly did not look for automobiles before walking into the street. Plaintiff was struck by defendant's truck. The

defendant offered no evidence but asked an instruction on contributory negligence which had not been pleaded. The trial resulted in a verdict and judgment in favor of the plaintiff. That judgment was affirmed on the specific ground that there was a statutory regulation requiring all vehicles to stop when a street car was loading or unloading and accordingly plaintiff was entitled to presume that the defendant would not violate the law. The Court held as a matter of law that the plaintiff was not contributorily negligent. The Court on the question of contributory negligence stated that even though contributory negligence was not pleaded, and even though the defendant was not entitled to introduce evidence of contributory negligence, by reason of its failure to plead such contributory negligence, that the defendant would be entitled to a directed verdict if contributory negligence of the plaintiff were made to appear as a matter of law or was entitled to have the issue of contributory negligence submitted to the jury if the matter of contributory negligence was not decided as a matter of law.

The case of *Mundy v. Davis,* 48 N.W. (2d) 394 was decided by the Supreme Court of Nebraska in the year 1951. That action involved a suit by the plaintiff for injuries received when he was struck by defendant's automobile. Judgment was given for the plaintiff in the lower Court and defendant's motions for new trial and for judgment notwithstanding the verdict were overruled. The Supreme Court reversed the judgment. The trial Court instructed

the jury that the burden was on the defendant to prove contributory negligence and that contributory negligence was the proximate cause or a contributing cause of plaintiff's injuries. The Supreme Court held that if a defendant pleads contributory negligence that the burden is on defendant to prove that defense and that such burden does not shift during the course of the trial. The Court further held that if the evidence adduced by the plaintiff tends to prove the issue of contributory negligence that the defendant is entitled to receive the benefit of that evidence and that the Court must instruct the jury to that effect. The Court further held that from the plaintiff's evidence the jury could properly have found that the plaintiff was contributorily negligent sufficient to defeat or reduce recovery and reversed the case for the reason that the trial Court had not properly submitted to the jury the issue of contributory negligence. The case contains a dissenting opinion on the ground that the trial Court need not instruct on contributory negligence in the absence of a request for an instruction on that point.

Rule 15(b) of the *Federal Rules of Civil Procedure* reads as follows:

> "Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any

> time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would preclude him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

This Court and many of the other of the Courts of Appeals of the United States have had occasion to consider the matter of issues raised by express or implied consent of the parties but outside of the formal pleadings under such rule.

The case of *Balabanoff v. Kellogg,* 118 Fed. (2d) 597, was decided by the Court of Appeals for the Ninth Circuit in the year 1940. This cause arose originally in the District Court for the Territory of Alaska, Third Division and involved an action to enjoin the diversion of certain water. Judgment for the plaintiff was affirmed by this Court. The Court held that in the absence of appropriate attack, the complaint must be held to state a cause of action. There was no objection to the introduction of evidence relative to priorities. No motion was made at the close of the case as to the insufficiency of the pleading. The cause was tried and submitted on the theory that the matter at issue was the relative priorities.

The Court held that no good purpose would be served by sending the case back, and treated the complaint as amended to conform to the proof. On petition for rehearing the Court held that the chief proposition urged was that the Court lacked power to treat the complaint as amended to conform to the proof. The Court cited Rule 15(b) of the Federal Rules of Civil procedure above quoted. The Federal Rules of Civil Procedure had not at that time been made applicable to the Courts of the Territory of Alaska. The Court in ruling held that it need not inquire as to whether the Federal Rules of Civil Procedure were applicable in Alaska and said that the provisions of Rule 15(b) are merely an application of the principle prevailing generally under code pleading and cited Section 3451 of the Compiled Laws of Alaska for 1933 to the effect that no variance shall be deemed material unless it shall have actually misled the adverse party to his prejudice in maintaining his action on the merits. It also cited Section 3452 of the Compiled Laws of Alaska for 1933 to the effect that when a variance is not material the Court may direct facts to be found according to the evidence or may order an immediate amendment. Also cited was Section 3461 of the Compiled Laws of Alaska for 1933 to the effect that the Court in every stage of a proceeding should disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party. These sections are now 55-5-71, 55-5-72 and 55-5-81 respectively of Alaska Compiled Laws Annotated, 1949.

The case of *Rogers v. Union Pacific Railroad,* 145 Fed. (2d) 119, decided by the Court of Appeals for the Ninth Circuit in the year 1944, involved a suit by an employee against the railroad company for wages. Judgment was given to the plaintiff in an amount which was unsatisfactory to him and he appealed. This Court reversed the judgment. Appellant contended that appellee's right to set off overpayments was foreclosed because it was not pleaded. The Court pointed out that the issue of overpayment was expressly raised in the pre-trial order and so was properly before the Court. Moreover the Court said that evidence of overpayment was introduced without objection and the issue was tried by implied consent of the parties that that fact in itself would require the Court to treat it as if raised by the pleadings, citing rule 15(b) of the Federal Rules of Civil Procedure.

The case of *El Paso Electric Co. v. Surrency,* 169 Fed. (2d) 444, decided by the Court of Appeals for the Tenth Circuit in 1948 involved a suit for personal injuries in an automobile accident. Judgment for the plaintiff was affirmed. The defendant in that case produced a witness who gave testimony of the negligence of defendant's agents which was not within the issue of negligence as alleged in the complaint. No objection was made to such evidence. The Court was not asked to strike such evidence. It was received and considered the same as other testimony. The Court in ruling held that Rule 15(b) of the Federal Rules of Civil Procedure provides that when issues are not

raised by the pleadings but are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised by the pleadings, and that the pleadings may be amended to conform thereto. The Court further held that the Courts of New Mexico had held that where a material fact omitted from the pleadings is litigated without objection as if said fact had been put in issue by the pleadings, it is the duty of the trial Court to amend the complaint in aid of the judgment so as to allege the omitted fact and that likewise the Federal Courts have held that where evidence was received without objection, the issue raised thereby was before the Court for determination. Defendant contended in that case that since the plaintiff's cause of action was predicated solely on the defendant's negligence in operating a dangerous truck on the highway and did not include any claim of negligence in operation of the truck by its employees, that it was error of the Court to instruct on "law of the road". The Court said that it followed from what had previously been said in the opinion that evidence of negligence received in the testimony of defendant's witness became a part of the case and that thus the trial Court was required to give the challenged instruction.

The case of *Haskins v. Roseberry,* 119 Fed. (2d) 803, was decided by the Court of Appeals for the Ninth Circuit in the year 1941. In that case the plaintiff sued to quiet title to certain mining ground in the State of Nevada. Judgment in the trial Court was for the defendant. The defendant in that case

claimed that the statute of limitations barred the action. The plaintiff claimed that the question as to the statute of limitations was not before the Court because it had not been pleaded in that Rule 8(c) of the Federal Rules of Civil Procedure, requires an affirmative plea as to the statute of limitations. The Court held that it was unnecessary to decide as to whether the statute of limitations should have been pleaded and cited Rule 15(b) of the Federal Rules of Civil Procedure.

The case of *Vernon Lumber Company v. Harcen Const. Co.,* 155 Fed. (2d) 348, was decided by the Court of Appeals for the Second Circuit in the year 1946. In that case there was a suit by the plaintiff and a counterclaim by the defendant. Judgment was given to both parties on their respective claims. On appeal the judgment of the lower Court was reversed. Plaintiff challenged the award of damages on the counterclaim on the theory that there had been a waiver of non-delivery. The defendant on the other hand asserted that such waiver could not be asserted because it had not been pleaded as an affirmative defense. The Court held that it was not necessary to pass upon the issue of technical pleading since the evidence bearing upon the waiver issue was freely received and considered and hence it was before the District Court as it was before the Court of Appeals on appeal, citing Rule 15 (b) of the Federal Rules of Civil Procedure.

The case of *Scott v. Baltimore and O. R. Co.,* 151 Fed. (2d) 61 was decided in the year 1945 by the

Court of Appeals for the Third Circuit. This was a suit under the Federal Employees' Liability Act for damages for personal injuries. The defendant claimed that the boiler inspection act was not pleaded but was used as the basis for liability of the defendant. The defendant did not object that evidence offered concerning a defective "throttle dog" took it by surprise. The Court in its opinion used the following language:

> "perhaps the shortest and most conclusive answer to make to defendant's contention in that respect is that the present rule (15(b)) permits plaintiff to change his position in this way and that the citation of state cases is irrelevant. We may assume arguendo, that plaintiff started his action on one theory which his proof did not support. Then the proof, we may assume, sustained recovery on another ground. It is true the pleadings could then be amended to conform to the proof, but obviously this would give no satisfaction to the defendant. The only injustice to defendant in such situation is when he is compelled to go on with the trial and meet a new point which is a surprise to him and on which he has no opportunity to prepare. This situation is not claimed by defendant to exist here."

Judgment for the plaintiff was affirmed.

The case of *Atchison, T. & S. F. Ry. Co. v. Judson Co.,* 49 Fed. Sup. 789 was decided by the District Court for the Southern District of California in the year of 1943. In that case the shipper maintained that the pleadings were not broad enough to permit evidence of collusion. The Court held as follows:

> "When the evidence was offered, shipper did not claim surprise or ask for continuance to meet this issue. Counsel tried this case on the theory that the said evidence was admissible and it was evident that counsel was fully prepared. Under such circumstances, any error in this respect would be harmless (citing Rule 61 of the Federal Rules of Civil Procedure) and the pleadings could be amended even after judgment to conform to the evidence (citing Rule 15(b)). Rule 54(c) requires this Court to render relief to the party entitled to the same and it would be absolutely contrary to the spirit of said rules for this court to permit a technicality to preclude the decision on the merits."

The case of *Shapiro v. Yellow Cab Co.,* 79 Fed. Sup. 348, was decided by the District Court for the Eastern District of Pennsylvania in the year 1948. A taxi driver for the defendant company had transported a partially paralyzed passenger to the railroad station and stopped short of the loading platform near a hole in the street. The plaintiff stepped out of the cab and fell into the hole. There was a judgment for the defendant and the plaintiff moved for a new trial. The motion for a new trial was granted by the Court. The motion was on the ground that the Court had instructed the jury that it could not consider certain facts which appeared from the evidence. In the case it appeared that plaintiff's complaint was limited to an allegation of negligence concerning the allowance of the hole in question. Evidence was produced either by the plaintiff without objection or by the defendant from which the jury

could have found that the defendant was negligent and that such negligence was the proximate cause of plaintiff's injury. The Court in its opinion used the following language:

> "In accordance with Rule 15(b) issues of fact raised by the evidence although not raised by the pleadings should have been treated as though raised by the pleadings."

The Court ruled that the jury should have been allowed to consider all of the evidence and reach its verdict and that the Court had unduly restricted the jury.

We believe, under general law and especially under the practice existing in the Territory of Alaska at the time of the trial under the Federal Rules of Civil Procedure, that the Court committed no error in instructing the jury on the theory of contributory negligence even though no plea had been made in the answers to that effect. We further submit that in any event under Rule 61 of such rules the appellant is not entitled to a reversal of the judgment in the instant case for the reason that no showing has been made by appellant that any error was committed by the District Court or that any error committed by such Court was prejudicial in any way to the appellant. Appellant further submits that no showing of any kind has been made or argument advanced that anything done by the trial Court affected the substantial rights of appellant. The record shows conclusively that evidence was introduced by the plaintiff from which the jury very properly might

have found that the plaintiff was contributorily negligent. The record shows that the plaintiff herself asked for an instruction on contributory negligence and excepted to the refusal of the Court to give such requested instruction. There is no showing at all that plaintiff was surprised by the evidence introduced or by the instruction given. On the contrary, it appears clear from the record that the trial Court should have granted defendants' motions for directed verdict or for judgment.

As previously pointed out appellees believe that this matter can be disposed of without considering the ruling of the trial Court on defendants' motions for permission to amend their answers to raise the issue of contributory negligence. It is probable that in view of the provisions of Rule 15(b) and the decisions decided under such rule a formal amendment was not necessary. However, defendants desired that nothing be left undone which should have been done. It appears clear to appellees that under Rule 15(b) and the cases previously cited that if amendment was necessary that the Court was entitled to allow such amendment even after verdict and that the action of the trial Court was proper in granting the motions of the defendants in that respect.

Appellant has shown nothing to indicate that she was prejudiced in any manner whatsoever by defendants' failure to plead contributory negligence in the first place or by the Court's ruling allowing an amendment to raise such plea to conform to the proof and to formally raise the issues which had been raised by

plaintiff's own evidence and tried by consent of the parties.

The issue of contributory negligence was properly before the jury and to reverse the judgment on appellant's plea that contributory negligence was not raised by the pleadings would be to substitute form for substance and would be in direct violation of the letter and of the spirit of the Federal Rules of Civil Procedure.

Dated, Anchorage, Alaska,
August 15, 1952.

Respectfully submitted,
DAVIS & RENFREW,
By EDWARD V. DAVIS,
Attorneys for Appellees.